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In the Supreme Court of the United States

October Term, 1995

AMERICAN PIONEER LIFE INSURANCE COMPANY AND JERRY CURTIS, *Petitioners*

v.

FREDDY J. WILLIAMSON, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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42 pp

QUESTION PRESENTED

Whether the $2,000,000 punitive damage award in this case is so excessive as to violate the Due Process Clause of the Fourteenth Amendment?

RULE 29.1 STATEMENT

Petitioner American Pioneer Life Insurance Company is owned by American Pioneer Progressive Life and Health Insurance of New York, Inc., which is owned by Universal Holding Corporation. American Pioneer has no subsidiaries.

TABLE OF CONTENTS

Page

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL PROVISION INVOLVED.....2

STATEMENT.....2

REASONS FOR GRANTING THE PETITION.....8

CONCLUSION.....12

TABLE OF AUTHORITIES

Cases **Pages**

BMW of North Amnerica, Inc. v. Gore,
No. 94-896.....passim

Henderson v. Alabama Power Co.,
627 So.2d 878 (Ala. 1993).....6

Honda Motor Co. v. Oberg,
114 S. Ct. 2331 (1994).....9

Life Insurance Company of Georgia v. Johnson,
1995 WL 683857 (Ala. Nov. 17, 1995).....9

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991).....9

Pulla v. Amoco Oil Company,
72 F.2d 648 (8th Cir. 1995).....10

TXO Prod. Corp. v. Alliance Resources Corp.,
113 S. Ct. 2711 (1993).....8-10

Statutes

28 U.S.C. 1257(a).....2

Miscellaneous

R. Stern, E. Gressman, S. Shapiro & K. Geller,
Supreme Court Practice (7th ed. 1993).....2

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PETITION FOR A WRIT OF CERTIORARI

Petitioners American Pioneer Life Insurance Company and Jerry Curtis (American Pioneer) respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra*, (1a-14a) is reported at 1995 WL 372051. The opinion of the Supreme Court of Alabama overruling petitioners' application for rehearing (App., *infra*, 15a-19a) is reported at 1995 WL 694530. The order of the Circuit Court of Jefferson County denying petitioners' post-trial motions (App., *infra*, 20a-25a) is not reported.

JURISDICTION

The decision of the Alabama Supreme Court was rendered on June 23, 1995 (App., *infra*, la), and a timely application for rehearing was overruled on November 22, 1995 (App., *infra*, 15a). On December 21, 1995, Justice Kennedy stayed enforcement of the judgment of the Supreme Court of Alabama pending the timely filing and disposition by this Court of a petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law***."

STATEMENT

The Court has granted certiorari to the Supreme Court of Alabama in *BMW of North American, Inc.* v. *Gore*, No. 94-896, to consider, among other things, whether the $2 million punitive damage award in that case is so excessive as to violate due process. The present petition, also from a decision of the Supreme Court of Alabama, raises a virtually identical issue. Accordingly, the Court should hold the petition for disposition as appropriate in light of its decision in *BMW*. See R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice § 4.16, at 192-193 (7th ed. 1993).

Petitioner American Pioneer is an insurance company based in Florida which sells its policies nationwide through independent insurance agents. R. 392.[1] Respondent Freddy J. Williamson is an independent insurance agent in Jefferson County, Alabama, who sold American Pioneer policies. Williamson has contracted with approximately 30 or 35 different insurance companies to sell their policies. R. 673-684, 755.

This lawsuit stems from American Pioneer's termination of Williamson's commissions on existing policies in reliance on a provision of the contract between the company and its agents for forfeiture of commissions when an agent "induces" a client to move his insurance business from American Pioneer to another company. App., *infra*, 3a. Insurance companies typically pay agents as commissions virtually all of first-year premiums on new business and relatively small portions of premiums in subsequent years. The forfeiture provision is standard in the industry and is designed to protect companies against agents' "rolling business" in order to maximize first-year commissions. R. 949-951, 691.

Williamson testified at trial that between 1984 and 1987 American Pioneer was his "key company" and that most of the policies he sold in that period were American Pioneer policies. R. 684. Williamson also testified that beginning in 1988 he stopped doing so much business with American Pioneer and that from 1987 to 1988 his business with the company dropped by about 50 per cent. R. 705, 760. Between 1988 and 1989, Williamson's commissions dropped more than another 50 percent. R. 509-518; Def. Exh. 5. In 1988, Williamson began renting an office in the Protective Life Insurance

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[1] "R.____" refers to the reporter's transcript of the trial below.

Company ("Protective Life") building, and at about the same time, according to Williamson, Protective Life became his "key company." R. 684, 781-782.

In early 1989, Williamson replaced the American Pioneer life insurance policy of his client Michael Carroll with a life insurance policy issued by Protective Life. In April 1989, American Pioneer notified Williamson that he had forfeited any future commissions on existing policies from the company due to his replacement of Carroll's policy. App., *infra*, 3a; R. 718. At about the same time, on account of a lack of production, Williamson was terminated as an American Pioneer agent. R. 514-515. This suit, challenging the forfeiture only, followed.

At trial, Williamson and Carroll both testified that Carroll called Williamson to initiate the change in his coverage and that Carroll's desire to have a policy issued by an A-plus rated company precluded continued coverage by American Pioneer which was not A-plus rated. R. 710-714, 282-286. Karen Kline, the American Pioneer official who made the decision to invoke forfeiture of Williamson's commissions, testified that she did so after reviewing his file and computer records pertaining to his commission history. She said that Williamson's file contained three other replacement notices and his commission history showed a sharp decline raising a question about his "persistency" or loyalty to the company. On this basis, she concluded Williamson was "rolling the business," and she sent out the forfeiture letter. R. 889-894.

Klein acknowledged that no one from American Pioneer had contacted either Williamson or Carroll to inquire whether Williamson had "induced" Carroll's transfer to

another company. R. 917-918. Another American Pioneer witness equated the contract's use of the word "induce" with "replace." App., *infra*, 6a-9a.

American Pioneer has more than 3,000 agents nationwide. The evidence showed that the forfeiture provision has been invoked against only twelve of those agents. R. 899. Nonetheless, at the conclusion of his closing argument, Williamson's counsel referred to American Pioneer's 3,000 agents nationwide and urged the jury to award punitive damages sufficient to establish the "Freddy Williamson Rule":

> Why don't you allot or award X number of dollars for each of those three thousand agents? One dollar, ten dollars, a hundred dollars, whatever. Multiply it so you have a yearly amount. Multiply that amount for as many years as you think it's going to take the Al Parents and Jerry Curtises and the Karen Klines of this world to understand what they have done. And call it the Freddy Williamson Rule.

R. 1122-1123.

The jury awarded Williamson $250,000 in compenstory damages, plus $3 million in punitive damages.[2]

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[2] At the time of the jury verdict in this case, April 1993, an Alabama statute limited punitive damages to $250,000 in cases not involving a pattern or practice of wrongdoing. The Circuit Court had entered a directed verdict rejecting Williamson's claim of a pattern and practice at the close of his case (R. 852), and pursuant to the statute limiting punitive damages, the Circuit Court entered a judgment in this case providing for punitive damages of $250,000 notwithstanding the jury award of $3 million. In

With respect to compensatory damages, the evidence showed that Williamson's residual commissions for 1988, the year before the forfeiture, were $4,169. R. 510-511; Def. Exh. 5. At trial Williamson acknowledged that, given his unchallenged termination in 1989 as an American Pioneer agent, his residual commissions could be expected to decline continuously after 1989 (R. 732-806; Pl. Exh. 21) and that no residual commissons would be payable after ten years (R. 792-793). In the face of this evidence, the $250,000 that the jury awarded Williamson in compensatory damages constitutes, in present dollars, his 1988 level of residual commissions for sixty future years. The jury's $3 million punitive damage award is thus a significant multiple of an already "punitive" compensatory award.

American Pioneer filed post trial motions in which it raised among other issues the constitutionality of the punitive damage award. Its motions were denied. American Pioneer again raised the issue of the excessiveness of the punitive damage award in the Alabama Supreme Court. On June 23, 1995, the Alabama Supreme Court affirmed subject to a remittitur of the punitive damages award to $2 million. App., *infra,* 14a. In reducing the punitive damages, the Supreme Court held that the trial court's consideration of evidence that American Pioneer had invoked the forfeiture provision against twelve other agents was improper because there was no evidence of the circumstances in those twelve

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(footnote 2 continued)
Henderson v. *Alabama Power Co.*, 627 So.2d 878 (Ala. 1993), the Alabama Supreme Court subsequently invalidated the statute limiting punitive damage awards on the ground that the statute violated the right to trial by a jury guaranteed by the Alabama Constitution. Following the Alabama Supreme Court's decision in *Henderson*, the Circuit Court in this case reinstated the award of $3 million in punitive damages.

instances. App., *infra*, 13a. Noting that the company's surplus cash reserves were about $7 million, the Alabama Supreme court held that the jury's award of $3 million in punitive damages " 'exceeds the amount necessary . . . to accomplish society's goals of punishment and deterrence'." App., *infra*, 14a (citations omitted).

On November 22, 1995, the Alabama Supreme Court overruled without opinion American Pioneer's application for rehearing, which reurged its constitutional objections to the punitive damage award. App., *infra*, 15a. In a dissent to the denial of rehearing, Justice Maddox expressed his view that the $2 million punitive damages award is "an unconstitutional taking of American Pioneer's property."

> The jury in this case, it appears to me, has compensated the plaintiff for the harm he suffered, and the maximum punitive damages award that I would permit would be $250,000, because there does not seem to be clear and convincing evidence that the defendants engaged in a pattern and practice of misconduct that would justify more than that amount.

App., *infra*, 19a.[3]

On December 6, 1995, the Alabama Supreme Court denied American Pioneer's request for a stay pending the filing and disposition of a petition for certiorari in this Court. On December 21, 1995, Justice Kennedy granted a stay.

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[3] Justice Maddox also agreed with American Pioneer that it was improper to permit post judgment interest totalling to date approximately $500,000 on the punitive damage award. App., *infra*, 16a-18a.

REASONS FOR GRANTING THE PETITION

The petitioner in *BMW* argues that the punitive damage award in that case violates substantive due process because it bears no reasonable relationship to the actual or potential harm to the plaintiff, to the nature of the defendant's conduct, or to any other appropriate criterion for testing the reasonableness of a punishment.

The same claim is made by petitioners in this case. As in *BMW*, the punitive damages here are highly disproportionate to the harm suffered by the plaintiff. In neither case was there a showing of unrealized potential harm.

As in *BMW*, the conduct for which American Pioneer has been punished is minimally reprehensible. The commission forfeiture provision which is standard in contracts between insurance companies and their independent agents is designed to deter agents from replacing policies in order to maximize high first-year commissions. American Pioneer's application of this provision, in circumstances in which Williamson was replacing its policies, without first investigating to determine whether Williamson was "inducing" his clients to make the change, while actionable, is not the sort of outrageous conduct that can support a huge punitive damage award. *Compare TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2722 (1993) (a "pattern of fraud, trickery and deceit").

Because of the similarities between this case and *BMW*, the Court should hold the petition pending its decision in *BMW*. If the Court rules in favor of BMW on the excessiveness issue in that case, it should grant American

Pioneer's petition, vacate the decision below, and remand for further consideration in light of *BMW*.

If this Court does not reach the excessiveness issue in *BMW*, the Court should grant certiorari in this case to address that issue.

This Court has recognized that the Due Process Clause "imposes a substantive limit on the size of punitive damage awards." *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2335 (1994). *See also TXO*, 113 S. Ct. at 2730. While the procedural requirements for the imposition of punitive damages required by due process have been addressed, *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991),[4] *TXO*, *Oberg*, the Court has not provided adequate guidance for the application of the substantive due process component.

In *TXO*, the Court held that the substantive requirements of due process are not violated by a large disparity

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[4] The Alabama Supreme Court has recently revised Alabama's punitive damage process approved by this Court in *Haslip* in order to meet "the need for more guidance for juries in these cases." *Life Insurance Company of Georgia* v. *Johnson*, , 1995 WL 683857 at *9 (Ala. Nov. 17, 1995). In *Johnson*, the Alabama Supreme Court remitted the amount of the punitive damages from $15 million to $5 million (at *15), and established prospectively a process by which trial of liability and compensatory damages is bifurcated from the trial of punitive damages (at *11). The Court set forth a lengthly list of factors for juries to consider in awarding punitive damages, but articulated no general principles and offered no guidance on the relative weight of the many factors it listed (at *11-12). The Alabama Court also provided for equal allocation of punitive damage awards between plaintiff and the State after deduction of reasonable expenses of litigation (at *12-13]. Following the Alabama Supreme Court's decision in *Johnson*, the Attorney General of Alabama has sought to intervene in this case to protect the State's interest in the punitive damage award and specifically to prevent settlement of the case without the consent of the State.

between punitive damages and compensatory damages where the conduct of the defendant had the potential for far greater harm. But the Court in *TXO* did not go further and articulate a general standard for measuring punitive damage awards against the requirements of substantive due process. Specifically, the Court in *TXO* did not define a rule of decision where, as here, the punitive damage award is highly disproportionate both to the actual and the potential harm, as well as to the degree of offensiveness of the defendant's conduct.

This was emphasized in a recent opinion authored for the Eighth Circuit by Justice White:

> It is clear that an award of punitive damages is subject to review to determine whether it violates principles of substantive due process, but as indicated by the plurality and other opinions filed in *TXO Prod. Corp. v. Alliance Resources Corp.*, . . . it is not easy to clearly discern the analytical framework for reviewing such awards.

Pulla v. *Amoco Oil Company*, 72 F.3d 648, 658 (8th Cir. 1995) (citation and footnote omitted). Justice White went on to develop and apply substantive standards in reversing the $500,000 punitive damage judgment in that case.

A similar exercise by this Court is sorely needed. The number of cases with petitions for writs of certiorari raising the issue of unconstitutionally excessive punitive damage awards that are currently pending before this Court is

evidence of the need for this Court's guidance.[5] In addition, each passing week brings news of enormous punitive damage awards unconstrained by substantive due process.[6] This case provides the Court with an opportunity to articulate needed standards.

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[5] There are at least 14 pending petitions for certiorari raising the issue of the excessiveness of punitive damages: Fraidin v. Weitzman, No. 94-1230; Liberty Mutual Insurance Co. v. Chemstar Inc., No. 94-1337; Owens-Corning Fiberglas Corp. v. Pickering, No. 94-1476; Oxy USA Inc. v. Continental Trend Resources Inc., No. 94-1838; Honda Motor Co. v. Oberg, No. 94-1890; Independent Life and Accident Insurance Co. v. Harrington, No. 94-2016; Wolfberg v. Greenberg, No. 95-433; Union Security Life Insurance Co. v. Crocker, No. 95-740; Ford Motor Co. v. Sperau, No. 95-771; Owens-Illinois Inc. v. Rekdahl, No. 95-797; Owens-Corning Fiberglas Corp. v. Brennan, No. 95-800; Owens-Corning Fiberglas Corp. v. Rekdahl, No. 95-818; Life Care Centers of America, Inc. v. Easthampton Assoc. Ltd. Partnership, No. 95-1051; Combustion Engineering, Inc. v. Johnson, No. 95-1072.

[6] *See* Amicus Brief of the Chamber of Commerce of the United States of America supporting the petition for a writ of certiorari in Union Security Life Insurance Company v. Crocker, No. 95-740.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

February 16, 1996.

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APPENDIX A

SUPREME COURT OF ALABAMA

American Pioneer Life Insurance Company
and Jerry Curtis, a vice president of American Pioneer

v.

Freddy J. Williamson

1921796

June 23, 1995

COOK, JUSTICE.

The defendants appeal from a judgment based on a jury verdict awarding $250,000 in compensatory damages and $3,000,000 in punitive damages to Freddy J. Williamson on his breach of contract and fraud claims against American Pioneer Life Insurance Company and Jerry Curtis, a vice president of American Pioneer. We affirm conditionally.

Freddy Williamson contracted in 1984 with American Pioneer Life ("APL") to sell its life insurance products, and he did so until early 1988, when the managing general agent for Alabama, as well as Williamson, were terminated for

"lack of production." Williamson contacted APL in April 1988, and began selling again for APL in May of that year. He was terminated on April 13, 1989, again for lack of production. On April 25, 1989, APL wrote Williamson a letter notifying him that APL was invoking the "forfeiture of commissions" provision of his contract and that, pursuant to that provision, Williamson would no longer be entitled to receive commissions on insurance policies already in place. APL stated in its letter to Williamson that it was invoking the forfeiture provision because Williamson had replaced a client's APL policy with an insurance product from another insurance carrier.

Williamson's contract with APL provided the following regarding vested commissions:

> "If this Contract is terminated by the Company or the Managing Sales Representative, or should the Managing Sales Representative die or become totally disabled while this Contract is in force, he, or in the case of his death, his heirs or legal representatives shall, except as hereinafter provided in this Contract, receive commissions that occur under the provisions of this Contract, if any. Such renewal commissions shall terminate when the total renewal commissions so payable are less than $300.00 annually."

Plaintiff's Exhibit Number 3.

The insurance contract further provided for the forfeiture of commissions, as follows:

"Forfeiture of Commissions

"Should you at any time, withhold Company funds, create fraud, malfeasance, or induce or attempt to induce policyholders of the Company to lapse, replace, or otherwise terminate their policies, or if your license is terminated for cause by the Insurance Department of any state, the Company shall terminate your right to all commissions or other compensation thereafter payable under this Contract or under any prior contract, and shall teminate this Contract as well as any other contracts then in force."

The client whose policy was replaced was Michael Carroll. Upon notification that Carroll's policy had been replaced, and without investigating the replacement, Karen Klein of APL wrote Williamson the following letter:

"It has come to our attention that you are replacing policies and according to your contract under 'Forfeiture of Commissions', we are terminating your right to all commissions or other compensation payable under your contract.

"If you have any questions regarding this matter, please contact either Mr. Al Parent, Treasurer, or me."

R. 593.

Williamson sued APL and Curtis, alleging breach of contract and fraud. The jury found in favor of Williamson and awarded compensatory damages of $250,000 and punitive damages of $3,000,000. The court entered a judgment based

on that verdict. APL and Curtis appealed, contending that the trial court had erred in submitting the fraud count to the jury and, in the alternative, arguing that the judge should have ordered a remittitur of the $3,000,000 punitive damages award.[1]

In *Southern Farm Bureau Life Insurance Co. v. Mitchell*, 435 So.2d 745 (Ala.Civ.App. 1983), the Court of Civil Appeals stated:

> "We note that as a general proposition, an insurance agent has no inherent right to receive renewal premium commissions. Any such right accruing to him depends solely and strictly on the terms of his contract with the company he represents. *Southern States Life Insurance Co. v. Allan*, 38 Ala.App. 467, 87 So.2d 439 (Ala.Ct.App. 1956)."

435 So.2d at 747. This Court must look to the contract between Williamson and APL to determine under what conditions Williamson was entitled to receive renewal commissions and under what conditions those commissions would be forfeited.

> "To prove fraud, a plaintiff must allege and prove each of the following elements: 1) a false representation of 2) a material fact, 3) which was relied upon by the plaintiff, 4) who was damaged

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[1] APL and Curtis raised two other issues on appeal. This Court has considered the appellants' arguments in regard to those other issues and finds them to be without merit. Those issues will not be discussed in this opinion.

5) as a result of his reliance. Ala. Code 1975, § *6-5-101*. When promissory fraud is alleged, two additional elements must be proved: 1) that the misrepresentation was made with a present intent to deceive and 2) that, at the time the misrepresentations were made, the defendant intended not to perform. *Leisure American Resorts, Inc. v. Knutilla*, 547 So.2d 424 (Ala. 1989) (citing *Selby v. Quartrol Corp.*, 514 So.2d 1294 (1987); and *Coastal Concrete Co. v. Patterson*, 503 So.2d 824 (Ala. 1987)."

Standard Furniture Mfg. Co. v. Reed, 572 So.2d 389, 391 (Ala. 1990). With regard to "promissory fraud" and the element of "present intent to deceive," we have written:

> "[T]his Court has often recognized that intent to deceive is an issue 'peculiarly within the province of the trier of facts.' *Hodges v. Pittman*, 530 So.2d 817, 818 (Ala. 1988). See, also *Super Valu Stores, Inc. v. Peterson*, 506 So.2d 317 (Ala. 1987); and *Southeastern Properties, Inc. v. Lee*, 368 So.2d 288 (Ala. 1979). Nonetheless, this Court has written:
>
> > " 'unless the plaintiff puts forth some proof that there was something more than a failure to perform, something upon which a jury could infer that at the time the promise was made the defendant had no intention of performing, it is error to submit a fraud claim to the jury. ' "
>
> *Hodges v. Pittman, supra*, at 819 (quoting *Martin v. American Medical International, Inc.*, 516 So.2d 640, 642 (Ala. 1987), quoting other cases)."

Standard Furniture Mfg. Co., 572 So.2d at 392.

The forfeiture provision in Williamson's contract stated that any attempt on Williamson's part to *induce* a policyholder to replace an existing APL policy would result in the forfeiture of commissions. In support of his fraud claim, Williamson offered evidence tending to show that Carroll had initiated the replacement of his policy and that Carroll's decision to replace it was not, in any way, influenced by Williamson. Williamson also offered the following testimony from Al Parent, APL's treasurer:

"Q. What does the term 'replace' mean to you?

"A. The term "replace' to me, would mean to take one item and substitute another.

"Q. To American Pioneer, in the context of this forfeiture clause, the word 'induce' and the word 'replace' are synonymous, aren't they, Mr. Parent?

"A. Yes, sir.

"Q. Do you have a dictionary, sir?

"A. Not with me, no.

"Q. Do you understand that a 'synonym' means that two words mean the same thing?

"A. Yes, sir.

"Q. I've got here a definition of 'induce' from Webster's 9th edition; do you see that?

"A. Now that you're closer, yes.

"Q. Let me give you a copy of it so you can see it. Jeff, would you give him a copy?

"Mr. Friedman: Yes.

"Q. (By Mr. Atchison) Do you have it there, sir?

"A. Yes, sir.

"Q. Okay. 'Induce,' make sure I'm reading it right. 'Induce, inducing,' I'll skip the Latin there. I'll begin with '1. To move by persuasion or influence.' Did I read that right?

"A. Yes, sir.

"Q. Tell this jury what evidence American Pioneer had on April 25th, 1989, that Fred Williamson had moved by persuasion or influence to cause Michael Carroll to do something?

"A. We had a replacement notice.

"Q. Had a replacement notice. Did you have a single other thing?

"A. I am not sure that we did, but I believe that form stood on its own.

"Q. Okay.

"....

"Q. Did American Pioner ever tell its agents, like Freddy Williamson, that it was going to use the term 'induce' as a synonym to the word 'replace'?

"A. No, sir.

"Q. So what you're telling us is, and you correct me if I'm wrong. What you really meant to say was, 'Should you at any time replace, then you're going to lose your premiums'?

"A. Yes, sir.

"Q. Did y'all have lawyers help you draw this up?

"A. I believe so.

"Q. Did you ever give any notice to any agent that what you really meant was 'replace' and not 'induce' or 'attempt to induce'?

"A. What do you mean by notice?

"Q. Writing, telephone calls, seminar, mailout, like we saw the mailout where you talked about AM Best, things like that.

"A. None that I can specifically refer to."

R.T. 412-417.

"A. [Parent:] The replacement form has to stand on its own. We cannot be present when the transaction is going on. The agent has a vested interest, if you will, in making sure that he gets a new first-year commission. There is a real tangible consideration in an agent replacing policies. That clause is in there to protect the company.

"Q. I thought it was in there to protect the policyholder. Is it to protect the company?

"A. Protect the company. That's a contract between the company and the agent.

"Q. So when American Pioneer decided to make 'induce' be 'replace,' it was doing that to protect itself?

"A. Yes, sir."

R.T. 472-73.

Williamson, therefore, offered evidence at trial tending to show that APL entered into a contract with Williamson knowing that if he replaced a policy, APL would consider him to have induced the replacement, without any investigation whatever. The contract clearly states that an agent will forfeit commissions only if the agent induces someone to change policies. No clause in the contract addresses

replacement of policies in regard to which no inducement has occurred. Therefore, Williamson offered sufficient evidence of fraud to warrant the court's submitting Williamson's fraud claim to the jury.

APL contends that the trial court erred in refusing to order a remittitur of the $3,000,000 punitive damages award. We agree, and we condition our affirmance upon the plaintiff's accepting a $1,000,000 reduction of the punitive damages award.

> "Subject to important state constitutional constraints, this Court has the authority under § 12-22-71, Ala.Code 1975, to determine the proper amount of recovery and to affirm the judgment, subject to the filing of a remittitur of the amount in excess of the proper amount, when the Court concludes that the judgment is excessive. The right to a trial by jury is a fundamental, constitutionally guaranteed right, Art. I, § 11, Const. 1901, and a jury verdict may not be set aside or remitted unless the verdict is flawed, thereby losing its constitutional protection, *Hammond v. City of Gadsden,* 493 So.2d 1374, 1378 (Ala. 1986), or unless, in the case of a punitive damages verdict, it exceeds the amount necessary, in the particular circumstances of the case, to accomplish society's goals of punishment and deterrence, *Green Oil Co. v. Hornsby,* 539 So.2d 218 (Ala. 1989).
>
> "....
>
> "... When excessiveness of punitive damages is the issue, the focus of our review is not on the

> plaintiff's injuries, but, rather, is on the reprehensibility of the defendant's conduct. *General Motors Corp. v. Johnston*, 592 So.2d 1054, 1063 (Ala. 1992). In compliance with the procedures mandated by *Hammond* and *Green Oil*, the inquiry is whether the amount of punitive damages awarded exceeds the amount necessary to accomplish society's goals of punishment and deterrence. *Green Oil*, 539 So.2d at 218."

Sears, Roebuck & Co. v. Harris, 630 So.2d 1018, 1033-34 (Ala. 1993).

We have carefully studied the record in this case. We have independently applied the following factors approved by the United States Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 at 21-22 (1991):

> " '(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil

> awards against the defendant for the same conduct, these also to be taken in mitigation.' "

(As quoted in *Northwestern Mutual Life Insurance Co. v. Sheridan*, 630 So.2d 384, 394 (Ala. 1993)). We note again the following comments regarding punitive damages:

> "Because the purpose of punitive damages is not to compensate the plaintifff but to punish the wrongdoer and to deter the wrongdoer and others from committing similar wrongs in the future, the proper amount of punitive damages rests largely within the jury's discretion. However, although punitive damages need bear no particular relationship to actual damages, they, nonetheless, must not exceed an amount that will accomplish society's goals of punishment and deterrence. *Maryland Casualty Co. v. Tiffin*, 537 So.2d 469 (Ala. 1988); *City Bank of Alabama v. Eskridge*, 521 So.2d 931 (Ala. 1988); *Roberson v. Ammons*, 477 So.2d 957 (Ala. 1985).

Green Oil Co. v. Hornsby, 539 So.2d 218, 222 (Ala. 1989).

Although the plaintiff attempted at trial to offer evidence that 12 other agents had forfeited commissions under similar circumstances, the trial court directed a verdict for APL with regard to Williamson's "pattern and practice" allegations against APL.[2] Williamson offered no

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[2] This case was tried before the release of *Henderson v. Alabama Power Co.*, 627 So.2d 878 (Ala. 1993), wherein this Court held unconstitutional § 6-11-21, (Ala. Code 1975, the statutory cap on punitive damages. Under § 6-11-21, claims supported by evidence of a "pattern and practice" with regard to fraudulent conduct provided an exception to the $250,000 cap on punitive damages and allowed a plaintiff to receive more than that amount.

evidence regarding the individual circumstances of the 12 instances; particularly, he offered no evidence of the similarities and differences as compared to this case. Although it directed a verdict with regard to the pattern and practice allegations, the trial court stated the following in its order denying the motion for remittitur:

> "This Court has considered the duration and repetition of the conduct, the defendants' awareness of the misleading policy and of the difficulties which the defendants' conduct caused for those such as the plaintiff. APL repeated its conduct by virtue of the fact that its representative testified she had been involved in 'approximately twelve' similar cancellations of vested renewal commissions as the one involving Mr. Williamson."

The court, at its *Hammond* hearing, should not have considered those 12 instances as evidence of "similar past conduct."[3] Furthermore, in its order the trial court did not address the financial position of APL. We note that APL contends that a punitive damages award of $3,000,000 would severely hamper the company's ability to meet its obligations to its insureds. This case went to trial in 1993. In support of the $3,000,000 punitive damages award, Williamson argues that in 1992 APL's total assets were valued at $49,787,497 and that the company had just over $7,000,000 in surplus cash reserves. Assuming these figures are correct, the punitive damages award equals approximately 6% of the

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[3] Although the trial court directed a verdict with regard to the "pattern and practice" allegations, the court's order denying the remittitur motion suggests that the trial judge did consider Williamson's "pattern and practice" evidence in denying the remittitur.

the punitive damages award equals approximately 6% of the total assets of APL and approximately 40% of the surplus cash held in reserve by APL in 1992. For comparison purposes, the $25,727,248 verdict in *Northwestern Mutual Life Insurance Co. v. Sheridan*, 630 So.2d 384 (Ala. 1993), was remitted to $12,863,624. The verdict in *Northwestern* (representing less than 1% of Northwestern's asssets) was in favor of an *insured*; the verdict in this case was in favor of *an agent of the insurer*, who undisputedly had approximately 15 years' experience in the insurance business and had contracted with over 30 insurance companies during that time.

With these factors in mind, coupled with the fact there have been no other civil awards against APL for the same conduct and no criminal sanctions for its conduct, this Court concludes that the jury's verdict of $3,000,000 "exceeds the amount necessary ... to accomplish society's goals of punishment and deterrence. *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989)." *Sears, Roebuck & Co. v. Harris*, 630 So.2d at 1034. Thus, the judgment of the trial count is affirmed, conditioned on Williamson's filing in this Court, within 28 days of the release of this opinion, a remittitur of $1,000,000 of the punitive damages award, reducing that award to $2,000,000.

AFFIRMED CONDITIONALLY.

Maddox, Almon, Shores, and Ingram, JJ., concur.

Butts, J., concurs in the result.

APPENDIX B

SUPREME COURT OF ALABAMA

American Pioneer Life Insurance Company
and Jerry Curtis, a vice president of American Pioneer

v.

Freddy J. Williamson

1921796

On Application for Rehearing

Nov. 22, 1995

COOK, JUSTICE.

APPLICATION OVERRULED.

Almon, Shores, Ingram, and Butts, JJ., concur.

Maddox, J., dissents.

MADDOX, JUSTICE (dissenting).

On original deliverance, I concurred in this Court's conditional affirmance of the trial court's judgment. On application for rehearing, the defendants raise several issues, most

of which were raised and addressed in the opinion on original deliverance, with the exception of one issue that was raised for the first time in the application for rehearing. That issue is whether the provisions of § 8-8-10, Ala. Code 1975, dealing with the accrual of interest on a judgment for the payment of money damages, should be applied, and, if applied, whether its application would violate the defendants' constitutional rights.

In overruling the application for rehearing, the Court does not address this issue, apparently on the ground that the issue should have been raised in the appellant's initial brief on appeal. I believe that the court errs in that regard.

In my opinion, the defendants have presented a meritorious argument on this issue. On the question whether the issue should have been raised earlier, it must be remembered that this Court *only conditionally* affirmed the lower court judgment. Second, the amount of post-judgment interest, which in this case could be as much as $500,000, was not considered by this Court, as I recall, in its *Hammond-Green Oil*[1] review, and I believe that it should be.

I first address whether interest should be allowed on the punitive damages award. Several courts have held that pre-judgment interest on punitive damages awards may not be recovered, and the rationale for that holding applies equally to *post-judgment interest.* The Supreme Court of Massachusetts has held:

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[1] *See, Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986); *Green Oil Co. v. Hornsby,* 539 So. 2d. 218 (Ala. 1989).

> "The damaged party is entitled to a return on the money that the party would have had but for the other party's wrongdoing. To give the damaged party more than that would go beyond the purpose of the statute. The purpose behind the prejudgment interest statute is not to penalize the wrongdoer, or to make the damaged party more than whole."

McEvoy Travel Bureau, Inc. v. Norton Co., 408 Mass. 704, ____, 563 N.E. 2d 188, 196 (1990) (citations omitted). The Supreme Court of Alaska has also stated:

> "Prejudgment interest is in the nature of compensation for use by [the] defendant of money to which [the] plaintiff is entitled from the time the cause of action accrues until the time of judgment. It is not meant to be an additional penalty."

Haskins v. Shelden, 558 P.2d 487, 494 (Alaska 1976).

In this case, while the plaintiff may be able to recover interest for the amount that he claims that the defendant did not pay him, i.e., interest on the compensatory award, the punitive damages award does not represent money owed to the plaintiff, and the amount of that penalty is not final until after this Court's review. The Texas Court of Appeals recognized the differing purposes of compensatory and punitive damages, as follows:

> "We conclude that equitable considerations cannot justify an award of pre-judgment interest in the present case. We reached this conclusion because the purpose of pre-judgment interest and [punitive]

> damages are incompatible. The paramount purpose of awarding [punitive] damages is *not* to compensate the plaintiff, but to punish and set an example for others. By contrast, pre-judgment interest is not intended to punish the defendant's misbehavior. We conclude, therefore, that because [punitive] damages do not compensate, pre-judgment interest on them is not necessary to make a plaintiff whole."

Granite Construction Co. v. Mendoza, 816 S.W. 2d 756, 766 (Tex. App. 1991) (citations omitted).

I also think that this Court should revisit the question of the excessiveness of the award. The plaintiff has filed a brief in opposition to the application for rehearing in which he states that "[f]ollowing the reduction of the punitive damages award, the [award] equalled approximately 4% of American Pioneer's 1992 *total assets.*" (Emphasis added.). However, the record indicates that at the time of the *Hammond-Green Oil* hearing in the trial court in the spring of 1993, the defendant's net worth was $7,280,211. The reduced award, coupled with the interest that has accrued, is approximately $2.75 million, which represents approximately 38% of the defendant's net worth.

There is another reason for revisiting the question of excessiveness of the punitive damages awarded. Since the release of this Court's original opinion, I have read a transcript of the oral arguments made by the parties in the Supreme Court of the United States relating to *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), cert. granted, ___ U.S. ___, 115 S.Ct. 932 (1995), in which the court is

examining, once again, Alabama's practice regarding the award of punitive damages. See, *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Based on the nature of the questions asked by the Justices at oral argument in the *BMW* case, and based on my reading of the holdings in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), *Haslip*, supra, *TXO Production Corp. v. Alliance Resources Corp.*, ____ U.S. ____, 113 S.Ct. 2711 (1993), and the more recent case of *Honda Motor Co., Ltd. v. Oberg*, ____ U.S. ____, 114 S.Ct. 2331 (1994), I believe that the judgment of this Court results in an unconstitutional taking of Pioneer Life's property; therefore, I must respectfully dissent, unless the Court orders a remittitur of all but $250,000 of the punitive damages award.

The jury in this case, it appears to me, has compensated the plaintiff for the harm he suffered, and the maximum punitive damages award that I would permit would be $250,000, because there does not seem to be clear and convincing evidence that the defendants engaged in a pattern and practice of misconduct that would justify more than that amount.

APPENDIX C

IN THE CIRCUIT COURT
FOR JEFFERSON COUNTY, ALABAMA

FREDDY J. WILLIAMSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION
	)	NUMBER
AMERICAN PIONEER	)	
LIFE INSURANCE	)	CV 39-9560
COMPANY, et al.,	)	
	)	
Defendants.	)	

ORDER

THIS CAUSE came to be heard on post-trial motions filed by defendants, American Pioneer Life Insurance Company and Jerry Curtis (hereinafter collectively referred to as "APL"); and in addition to post-trial motions on behalf of the defendants *Hammond* and *Green Oil* matters were addressed, briefed and argued before this Court. Based upon the submissions on behalf of the parties, oral argument by counsel at the hearing scheduled by this Court to consider the same, and based upon the post-hearing submissions, it is the Opinion, Finding and Conclusion of this Court that

the defendants' post-trial motions are due to be denied and as grounds therefore says as follows:

The undersigned judge was the trial judge and of course, the judge who has heard the above-stated matters, and at no time did it appear to the Court that any party in this case received less than a fair and impartial trial before the jury, and at no time did it appear to the Court that the verdict was a result of bias, passion, corruption or other improper motive.

The Court observed the attentiveness, interest and understanding of the jurors concerning the issues, evidence and testimony presented in this case. This Court particularly noted, as the jury could, the adamant position of the defendants that there was no fraud or misrepresentation but instead a simple matter of their interpretation of contract.

When defendants claim relief from punitive damages, the focus is on the defendants with regard to the assessment of the punitive damages under the facts of the case:

1. *The Harm Likely to Occur and the Harm that Actually Occurred.*

This case involved the denial and cancellation of benefits owed to the plaintiff through his contract with APL. The jury found the denial of the benefits to be a breach of contract coupled with fraud and misrepresentation by APL. The plaintiff was denied his "vested" renewal commissions as well as customer service information that resulted in compensatory damages the jury concluded to be in the amount of Two Hundred and Fifty Thousand Dollars ($250,000.00).

2. *The Defendant's Conduct is Likely to Cause Injury to Others Similarly Situated to the Plaintiff if not Remedied.*

Past and current agents with APL are unaware of the company's secret method of enforcing its agents' contracts to equate replacement of insurance policies with "inducement" to replace polices. The evidence was that APL does business in virtually every state in the United States and its policy to enforce APL's agent contracts is misleading and is likely to cause harm to other agents who rely on APL to fulfill its contractual obligation to pay vested commissions.

The plaintiff in this case was harmed and as a result of APL's fraud he was not paid vested renewal commissions nor was he given important information that would have allowed him to service his clients who owned insurance policies with APL.

3. *The Degree of Reprehensibility of Defendant's Conduct.*

It is desireable the defendants and others similarly situated be discouraged from misleading their agents. An agent entering a contract to sell insurance with the defendants has a right to rely on the written wording of the contract without having to wonder about secret interpretations or policies enforced by the defendants to negate the vested commissions guaranteed under the contract.

One of the issues presented in the trial of this case was whether or not APL destroyed certain documents that would

have allowed the plaintiff to discover other agents who had been damaged by the misleading policy of the defendants. Consequently, it is unknown just how extensive the defendants were involved in defrauding other agents besides the plaintiff. There is evidence from which a conclusion could be drawn the defendants have attempted to conceal or cover up the identity of other agents who were damaged similarly to Mr. Williamson.

This Court has considered the duration and repetition of the conduct, the defendants' awareness of the misleading policy and of the difficulties which the defendants' conduct caused for those such as the plaintiff. APL repeated its conduct by virtue of the fact that its representative testified she had been involved in "approximately twelve" similar cancellations of vested renewal commissions as the one involving Mr. Williamson. Mr. Al Parent testified that APL did nothing to put its agents on notice of how it secretly interpreted its contract and that the company had engaged in propagating a misleading policy for the past decade and continues this policy even now. Based upon the evidence and testimony the jury could well have found the defendants guilty of wrong-doing which was deceitful and intolerable.

This Court understands that it is to consider verdicts in similar cases in determining whether the verdict here was excessive. In the present case the defendants made no meaningful investigation to determine whether they had the right to refuse to pay the plaintiff his renewal commission; likewise, the defendants made no effort to disclose to the plaintiff, or anyone else, they had a secret policy to interpret their agents' contracts in a manner totally inapposite

of the written word. Based upon the defendants' conduct the amount of the verdict in this case is not shocking.

4. *Miscellaneous*

The Court has considered the financial position of the defendants. The Court has also considered the cost of bringing litigation, profit to the defendants, the lack of criminal sanctions, and the absence of other pending civil actions against APL and concludes that the verdict in this case should not be reduced.

5. *Conclusion*

By virtue of the ruling by our Supreme Court on June 25, 1993 in *Henderson v. Alabama Power,* SC 1901985, the issue as to any "cap" on punitive damages is moot.

Hence, this Court's judgment, entered on April 20, 1993, (notwithstanding the verdict) is set aside. This Court hereby enters judgment on the verdict in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) compensatory and Three Million Dollars ($3,000,000.00) punitive.

Further, having considered defendants' motion for JNOV, New Trial, to Alter, Amend, Vacate or Remittitur, and plaintiff's cross Motion to Reinstate Judgment, as well as reply briefs of the parties, this Court cannot find that its charges as to reckless misrepresentation and promissory fraud were mutually exclusive, in this case.

Further, without more, this Court is neither charged with the duty, nor vested with the authority to determine

whether another jury would "...produce the same results," (transcript of argument on Motion for New Trial, June 14, 1993, page 85).

DEFENDANTS MOTIONS ARE DENIED.

DONE AND ORDERED THIS THE 27 DAY OF JULY, 1993.

/s/

William J. Wynn

REPRINTED COPY

No. 95-1325

Supreme Court, U.S.
FILED
MAR 22 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

AMERICAN PIONEER LIFE INSURANCE COMPANY and JERRY CURTIS,

Petitioners,

REPRINTED COPY

vs.

FREDDY J. WILLIAMSON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners American Pioneer Life Insurance Company and Jerry Curtis waived their right to review the underlying verdict on the ground that it violates the Due Process Clause of the Fourteenth Amendment because the argument was not pressed or passed upon by the courts below.

2. Whether the punitive damage award in this case violates the Due Process Clause of the Fourteenth Amendment.

3. Whether the issue advanced by the Petitioners and the facts of the underlying case are sufficiently similar to *BMW v. Gore* so as to warrant this Court's review of the case.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below, Jurisdiction, Constitutional Provisions and Statutes Involved	1
Statement of the Case	1
Reasons for Denying the Writ	7
I. Petitioners Waived The Right To Review The Underlying Verdict On The Ground That It Violates The Due Process Clause Of The Fourteenth Amendment Because The Claim Was Not Pressed Or Passed Upon In The State Court Proceedings Below.	7
A. The Due Process Issue Was Not Addressed By The Alabama Supreme Court.	7
B. Petitioners Failed To Comply With Supreme Court Rule 14.1(g)(i)	12
II. The Punitive Damage Award In This Case Does Not Violate The Due Process Clause Of The Fourteenth Amendent.	14

Contents

Page

III. The Facts Of This Case Are Not Sufficiently Similar to *BMW v. Gore* To Justify This Court's Consideration Of The Issue Presented By Petitioners. 19

A. The Petitioners In *BMW* Argued That BMW Was Punished For Extraterritorial Conduct. 19

B. Petitioners' Conduct Was Much More Reprehensible Than In *BMW*. 20

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

Banker's Life and Casualty Company v. Crenshaw, 486 U.S. 71 (1988) 9, 10

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 12

BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994), *cert. granted*, __ U.S. __, 115 S. Ct. 932 (1995) 14, 19, 20, 21

Browning-Ferris Industries v. Kelco Disposal Co., Inc., 492 U.S. 257 (1989) 11, 12

Cardinale v. Louisiana, 394 U.S. 437 (1969) 7

Contents

	Page
Crowell v. Randell, 9 L. Ed. 458 (1836)	11
Dewey v. De Moines, 173 U.S. 193 (1899)	7
Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989)	9, 14, 15
Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986)	8
Henderson v. Alabama Power, Co., 627 So. 2d 878 (Ala. 1993)	14
Illinois v. Gates, 462 U.S. 213 (1983)	11
Lake Shore & Michigan Southern Ry. Co. v. Prentice, 147 U.S. 101 (1893)	16
McGoldrick v. Compagnie Generale, 309 U.S. 430 (1940)	11
Murdock v. City of Memphis, 22 L. Ed. (1875)	7
Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)	7, 9, 10, 15, 16, 18
State Farm Mut. Automobile Ins. Co. v. Duel, 324 U.S. 154 (1945)	11
Taylor v. Illinois, 484 U.S. 400 (1988)	10

Contents

Page

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. __, 113 S. Ct. 2711 (1993) 14, 16, 17

Webb v. Webb, 451 U.S. 493 (1981) 12

Statutes Cited:

28 U.S.C. § 1257 10

28 U.S.C.S. § 1257 1

United States Constitution Cited:

Eighth Amendment 10

Fourteenth Amendment ..... i, 7, 9, 10, 14, 18

Rule Cited:

Supreme Court Rule 14.1(g)(i) 12, 13

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The opinion of the Supreme Court of Alabama is reported at 1995 WL 372051. The opinion of the Supreme Court of Alabama overruling petitioners' application for rehearing is reported at 1995 WL 694530. Both opinions are reprinted in the Petition at Appendix A. The order of the Circuit Court of Jefferson County denying petitioners' post-trial motions is not reported but is reproduced in the petition at Appendix A.

Respondent submits that this Court does not have jurisdiction to review the verdict in question by writ of certiorari because the question presented by the petitioners does not concern conflicting decisions of courts of appeal or state courts nor does it bring into question the validity of a treaty or statute of the United States or the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States. In addition, there is no title, right, privilege, or immunity specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. 28 U.S.C.S. § 1257.

STATEMENT OF THE CASE

Respondent, Freddy J. Williamson (hereinafter "Williamson"), is an independent insurance agent from Trussville, Alabama. R. 679; 674. As an independent insurance agent, Mr. Williamson received renewal commissions[1] from various insurance companies with whom he had contracted and sold insurance. R. 681. Mr. Williamson worked as an agent for

1. A renewal commission is money paid to an agent for a set number of years under the terms of the contract if the policyholder renews the insurance policy after the initial coverage period. R. 406-407; 914.

petitioner American Pioneer Life Insurance Company (hereinafter "American Pioneer") from 1984 to 1989 under a written contract which promised him renewal commissions. R. 684; 815. He sold various products offered by American Pioneer including life insurance, disability insurance, cancer insurance, annuities and other type policies. R. 815. Mr. Williamson also sold health insurance policies for American Pioneer but a premium increase of 50% and a dramatic decline in claims handling effectively eliminated most health insurance sales by late 1987. R. 705; 813.

On April 13, 1989, American Pioneer terminated Mr. Williamson as an agent because of his declining sales. R. 708. Although he was no longer an active American Pioneer agent, Mr. Williamson's contract entitled him to continue receiving vested[2] renewal commissions. R. 397. He also continued to service American Pioneer policies sold by him and to receive information from the company regarding those policies. R. 689.

Just twelve (12) days later, Mr. Williamson was informed by American Pioneer that it was invoking the forfeiture clause in his contract. R. 898-899; 914; *see also*, Pl. Exh. 9. In its letter of April 25, 1989, American Pioneer accused Mr. Williamson of improperly inducing a policyholder[3] to replace an American Pioneer policy with a policy from another company. R. 914; 718. When American Pioneer invokes a forfeiture clause, the agent's

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2. A vested renewal commission is "one that the agent is entitled to receive." R. 560. These commissions are contractually earned and are due to the agent.

3. Mike Carroll was the policyholder. Uncontradicted trial testimony revealed he initiated contact with Mr. Williamson and requested a product unavailable from American Pioneer. He further testified that American Pioneer did not contact him before invoking the forfeiture clause. R. 281; 380.

renewal commissions are withheld and he is placed "completely in the dark" concerning insurance information about his clients. R. 525-526. By invoking the forfeiture clause in Mr. Williamson's contract, American Pioneer took his money and "put it in the pocket . . . of American Pioneer." R. 409. This lawsuit arose as a result of American Pioneer's actions.

Taking away Mr. Williamson's vested renewal commissions deprived him of income from American Pioneer for a ten (10) year period. R. 738. And by deliberately withholding policyholder service information from Mr. Williamson, American Pioneer effectively eliminated his ability to maintain his business or work on its growth. R. 725-730. Commissions, according to American Pioneer, are analogous to an annuity. R. 398. Using American Pioneer's own annuity projections, Mr. Williamson proved the value of commissions withheld totaled at least $112,500 if invested over ten years. R. 738.

The sole and undisputed reason given by American Pioneer for forfeiting Mr. Williamson's vested renewal commissions was because he allegedly "induce[d] or attempt[ed] to induce" Mr. Carroll to replace his policy.[4] R. 400; 410; 914. "Replacement" in the insurance industry means the substitution of a policy for one written by a different company. R. 587. There is nothing improper or illegal in Alabama for an agent to replace a policy if it is done in accordance with requirements of the Alabama Insurance Department. R. 562-563. The replacement of Mr. Carroll's policy met all such requirements. R. 585.

Before being terminated by American Pioneer on April 13, 1989, Mr. Williamson had been involved in three (3) policy

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4. Invocation of the forfeiture clause was the only way American Pioneer could stop Mr. Williamson from getting his vested renewal commissions under the contract. R. 400; Pl. Exh. 2.

replacements, all of which were reported to the company.[5] R. 697, 700, 702. Mr. Williamson was never criticized, warned, or otherwise told that he was violating any rule or policy at American Pioneer. R. 694; 701; 708. To the contrary, Mr. Williamson was considered "a good agent" having never been the subject of a complaint. R. 422; 527. Less than two weeks after termination as an agent, however, American Pioneer revoked Mr. Williamson's vested renewal commissions due to the replacement of a policy. Pl. Exh. 9; R. 897-898.

The transaction used by American Pioneer to invoke forfeiture began when Mr. Carroll decided, after consulting periodicals and conversion information, that he wanted a policy different from the one issued by American Pioneer. R. 281. Mr. Carroll and his wife desired a level premium policy with an industry rating of A+.[6] R. 281. The decision to change policies was made by Mr. Carroll before he ever called Mr. Williamson. R. 282-283.

Since American Pioneer had no product fitting Mr. Carroll's criteria, Mr. Williamson presented several policies from other companies for consideration. R. 306. Mr. Carroll's testimony was adamant and uncontradicted that Mr. Williamson did nothing to induce or attempt to induce the replacement of his policy. R. 282-283; 306.

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5. Mr. Carroll's replacement also was reported to American Pioneer. It took no steps to try and keep the business even though it had a department whose job was to try and conserve policies in force. R. 407; 463; 914.

6. American Pioneer was not an A+ rated company. It held a B+ rating. R. 710-714. Therefore, it was impossible to replace the existing policy with any American Pioneer product. Mr. Carroll had changed jobs and wanted to reduce the amount of his insurance because of benefits in his new job. R. 712.

With regard to the transaction involving Mr. Carroll, American Pioneer vice president Al Parent testified Mr. Williamson should have sold an American Pioneer policy to Mr. Carroll no matter what he wanted. R. 477. Of course, Mr. Carroll testified that if Mr. Williamson had not fulfilled his request for insurance, he would have gone "somewhere else" to get a new policy. R. 306.

Karen Kline worked as an assistant vice president of American Pioneer in April of 1989. She made the decision to terminate Mr. Williamson's commissions and to withhold policyholder service information. R. 889-890. The April 25, 1989, letter invoking the contractual forfeiture clause was prepared before Ms. Kline ever saw Mr. Williamson's file or otherwise considered his situation. R. 890. Ms. Kline took no action to contact either Mr. Carroll or Mr. Williamson before invoking the forfeiture clause. R. 913-914. Nor did Ms. Kline make more than a cursory attempt to investigate whether Mr. Williamson induced or attempted to induce the replacement of an American Pioneer policy. R. 914. According to Ms. Kline, Mr. Williamson's mere involvement with a replacement was sufficient to invoke the clause. R. 914.

Ms. Kline sent Mr. Williamson a form letter terminating him under the forfeiture clause just as she had done with 12 other agents simply because she received a replacement notice. R. 924; 917. Despite Ms. Kline's action, Mr. Parent testified that an agent's involvement in an insurance policy replacement is not wrong *per se*. R. 433; 506. The plaintiff's expert witness, Ms. Jan Dowdle,[7] explained that insurance policy replacement notices

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7. Ms. Dowdle is a licensed attorney who worked in the insurance industry in charge of licensing and agent compensation for Protective Life Insurance Company in all 50 states. R. 556. Her professional designations include; Fellow of Life Office Management Institute, Associate of Life & Health Claims, and Fellow of the Life Insurance Management Institute. R. 550-553.

are received quite frequently and that an agent's involvement in an insurance replacement does not constitute inducement of a policyholder to change policies. R. 562; 591. According to industry standards, an insurance agent should not have his or her livelihood taken away without an investigation. R. 568. In fact, Ms. Dowdle testified that she knew of "no reputable company" that would cut off an agent's renewal commissions and policyholder information solely because the agent was involved in providing a replacement policy for his or her client. R. 591.

The undisputed evidence proves American Pioneer had no basis to conclude Mr. Williamson had "induced" or "attempted to induce" the replacement of an insurance policy. American Pioneer had a policy of invoking an agent's forfeiture clause, without any investigation whatsoever, where the slightest colorable excuse was presented. American Pioneer's policy of equating "inducement" with a mere replacement was never communicated to any of the company's agents. R. 416-417. The trial court and jury recognized that American Pioneer had an unwritten, undisclosed and secretive policy of withholding agent's commissions after they were no longer producing enough sales for the company and using the receipt of a Replacement Notice to justify its actions. R. 415; 853.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS WAIVED THE RIGHT TO REVIEW THE UNDERLYING VERDICT ON THE GROUND THAT IT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE CLAIM WAS NOT PRESSED OR PASSED UPON IN THE STATE COURT PROCEEDINGS BELOW.

The petition filed by American Pioneer Life Insurance Company and Jerry Curtis (hereinafter "Curtis") is limited to the sole issue of whether the $2 million punitive damage award in this case is so excessive as to violate the Due Process Clause of the Fourteenth Amendment. Petition, p. i. Petitioners admit that the procedural requirements for the imposition of punitive damages were addressed by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Petition, p. 9. As such, the petition requests this Court to review the underlying verdict in order to determine whether the punitive damages award in this case violates a substantive limit imposed by the Due Process Clause. Petition, pp. 9-10.

A. The Due Process Issue Was Not Addressed By The Alabama Supreme Court.

The petition should be denied because the issue of whether the punitive damages award violates due process was never raised or argued during the state court appeals process nor was it passed upon by the Alabama Supreme Court. This Court has held for over a century that it will not consider a constitutional challenge to a state court decision where the challenge was not properly raised and preserved at the state court level. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Dewey v. De Moines*, 173 U.S. 193, 197-201 (1899); *Murdock v. City of Memphis*, 22 L. Ed. (1875).

On appeal to the Alabama Supreme Court, petitioners advanced several arguments. The Alabama Supreme Court pretermitted discussion of issues relating to the sufficiency of the evidence as well as the jury charge of reckless misrepresentation, stating that those issues were "without merit." *American Pioneer Life Ins. Co. v. Williamson*, 1995 WL 372051, p. 2 (Ala. 1995); Petition, p. 4a, n.1. As phrased by the Alabama Supreme Court, the remaining issues involved the petitioners' contention that "the trial court had erred in submitting the fraud count to the jury" and, in the alternative, "that the judge should have ordered a remittitur of the $3 million punitive damages award." *Id.*; Petition, p. 4a. The petitioners' brief on appeal phrased the issue pertaining to the size of the punitive damages award as follows:

> Whether the court erred in failing to reduce the $3 million punitive award, which represents approximately 40% of the net worth of the defendant, American Pioneer, and where there was no showing of profitability or other improper motive, since the evidence presented by defendant showed that APL's application of the forfeiture provision was in accordance with industry practice.

Petitioners' Brief on Appeal to the Alabama Supreme Court, p. vii.

The only issue on appeal to the Alabama Supreme Court, as phrased both by the petitioners and by the Alabama Supreme Court, failed to address or advance due process arguments. Rather, petitioners asserted that the trial judge erred in applying the procedures mandated by the Alabama Supreme Court in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986) and

Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989) and approved by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991). In deciding whether the trial court properly conducted post-trial review of the punitive damages award, the Alabama Supreme Court conducted an independent analysis of the factors approved by this Court in *Pacific Mutual Life Ins. Co. v. Haslip, supra,* and concluded that the punitive damages verdict should be remitted by $1 million. Petitioners did not advance a constitutional due process argument to the Alabama Supreme Court and for that reason, the Alabama Supreme Court never addressed that issue. Because the issue of whether the punitive damages verdict violates the Due Process Clause of the Fourteenth Amendment was never pressed or passed upon by the highest court of the State of Alabama, the issue has been waived and should not be considered on appeal to this Court.

This Court's long-standing rule of refusing to decide constitutional issues which were not raised and passed upon by a state's highest court was applied under similar facts in *Banker's Life and Casualty Company v. Crenshaw*, 486 U.S. 71 (1988). In *Crenshaw*, a Mississippi jury awarded the plaintiff $20,000 in compensatory damages and $1.6 million in punitive damages for the defendant's bad-faith refusal to pay an insurance claim. *Id.* at 71. The Mississippi Supreme Court affirmed the verdict. The initial appeal did not raise a federal constitutional challenge to the size of the punitive damages award. *Id.* In its petition for rehearing however, the defendant asserted that the award was "clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles." *Id.* This Court held that such a statement was not sufficient to preserve the due process issues on appeal.

> The vague appeal to constitutional principles does not preserve appellant's Contract

> Clause or due process claims. A party may not preserve a constitutional challenge by generally invoking the constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon.

Id. at 77 (*citing cf. Taylor v. Illinois*, 484 U.S. 400, 407, n. 9 (1988) for the proposition that "a generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights . . .").

This Court further noted that the defendant's reference to the excessiveness of the punitive damages verdict was better suited to a constitutional challenge to the size of the award based on the Excessive Fines Clause of the Eighth Amendment. *Id.* at 77. However, the Court concluded that "[a]lthough the petition for rehearing alleges that the fine is excessive, it does not indicate that the fine is excessive as a constitutional matter, be it state or federal." *Id.* at 78.

Concomitantly, while petitioners American Pioneer and Curtis asserted in their state court appeal that the verdict was excessive and should be remitted, they never provided more than a passing reference to due process and *never mentioned* the Fourteenth Amendment. Rather, they argued that the trial judge erred in applying the facts and evidence to the relevant legal standards approved by *Pacific Mutual Insurance Co. v. Haslip*, *supra.* In short, petitioners' appeal was limited to alleged plain error on the part of the trial judge.

This Court's rule prohibiting consideration of issues not decided by the highest courts of the states arises from Title 28 U.S.C. § 1257. The Court held early on that there would be no

jurisdiction unless a federal question was both raised and decided in the state court below. Unless both requirements appeared on the record, appellate jurisdiction would fail. *Crowell v. Randell*, 9 L. Ed. 458 (1836). Thereafter, this Court developed the rule that a federal claim would not be considered unless it had been either raised or squarely considered and resolved in the state court with the highest jurisdiction. *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-436 (1940). In *State Farm Mut. Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945), the Court reasoned that because a state supreme court did not pass on the federal question, this Court could not do so.

Similarly, in *Illinois v. Gates*, 462 U.S. 213, 215 (1983), this Court requested the parties to address an additional question other than those which were briefed and argued to the Court. However, the Court did not reach the issue. *Id.* at 222-223. The Court's ruling was grounded on the fact that there was never any 'real contest' during the appeal process below, and as such, the issue was not pressed or passed upon in the lower courts. *Id. See also Browning-Ferris Industries v. Kelco Disposal Co., Inc.*, 492 U.S. 257 (1989).

In *Browning-Ferris*, the petitioner's claim that due process acts as a check on undue jury discretion in awarding punitive damages was not considered because the argument was not raised earlier on appeal. *Id.* at 276-277. The Court reasoned as follows:

> In the absence of a developed record on the issues relevant to this due process inquiry, we shall not stretch the "clear intendment" doctrine to include this case, as we do not think the due process question is "only an enlargement" of the Eighth Amendment

> inquiry. Although the due process analysis of an award of punitive damages may track closely the Eighth Amendment analysis suggested by petitioners, we shall not assume that to be the case and shall not attempt to decide the question in the absence of a record on the due process point developed in the district court and the Court of Appeals.

Id. at 277, n. 23.

This Court has further held that at the minimum, "there should be no doubt from the record that a claim under a *federal* statute or the *federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981). *See also Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-550 (1987).

Because the petitioners in the present case failed to properly preserve the due process issues, those issues were never passed upon by the Alabama Supreme Court, thus creating a void in the record. Hence, there is nothing for this Court to review. Because the due process issue was not decided by the Alabama Supreme Court, it should not be passed upon by this Court due to the deficiencies in the record below and the jurisdictional rule prohibiting such review.

B. Petitioners Failed To Comply With Supreme Court Rule 14.1(g)(i).

Rule 14.1(g)(i) requires that the Petition for Writ of Certiorari contain cites pertaining to:

> When the federal questions sought to be

> reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. . . .

United States Supreme Court Rule 14.1(g)(i).

The petitioners have failed to comply with this rule. In an attempt at compliance, petitioners cite a portion of the dissent to the application for rehearing to the Alabama Supreme Court as the sole reference to their belated due process argument. Petition p. 7. There is no reference to the record below, no reference to the trial court's rulings and no reference to the Alabama Supreme Court opinion which was issued before the petitioners filed their application for rehearing to the Alabama Supreme Court. The reason for petitioners' failure to cite the relevant portions of the record and opinion below is due to the fact that petitioners' due process argument was not pressed or passed upon by the Alabama Supreme Court. Rather, the Alabama Supreme Court reviewed the action of the trial judge and the application of the law to the facts and evidence.

In the dissent to the decision overruling the petitioners' application on rehearing, Justice Maddox of the Alabama Supreme Court points out that the maximum punitive damages award he would permit would be $250,000. 1995 WL 694530,

p. 2 (Ala. 1995); Petition, p. 19a. It was Justice Maddox's opinion that petitioners had not engaged in "a pattern and practice of wrongful conduct that would justify more than that amount." *Id.* Justice Maddox's dissent is a memorialization of an Alabama statute which limited punitive damages to $250,000 in cases not involving a pattern and practice of wrongful activity. Ala. Code § 6-11-21 (1975). That statute was declared to be in violation of the Constitution of the State of Alabama in *Henderson v. Alabama Power, Co.*, 627 So. 2d 878 (Ala. 1993). Justice Maddox conducts no due process analysis in his dissent. Although he cites *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *cert. granted*, __ U.S. __, 115 S. Ct. 932 (1995); Petition, pp. 18a-19a, at no time was the issue addressed in the opinion of the Alabama Supreme Court. *See American Pioneer Life Ins., Co. & Jerry Curtis v. Freddy J. Williamson*, 1995 WL 372051; Petition, pp. 1a-14a. Because the decision was affirmed without opinion on rehearing, the due process issue was not pressed or passed upon by the highest court of the State of Alabama. Petition, pp. 15a-19a.

II.

THE PUNITIVE DAMAGE AWARD IN THIS CASE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioners assert that the Due Process Clause of the Fourteenth Amendment imposes a substantive limit on the size of punitive damages awards by a jury. A plurality of this Court has held that "grossly excessive" punitive damages may violate due process. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. __, 113 S. Ct. 2711, 2718-2719 (1993). However, the plurality in *TXO* also concluded that when an "award was reviewed and upheld by the trial judge" and then unanimously affirmed on appeal, there was a "strong presumption of validity." *Id.* at 2720.

In the present case, the trial judge applied the standards set forth by *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989) and *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). *American Pioneer Life Ins. Co., v. Williamson*, 1995 WL 372051, p. 2 (Ala. 1995); Petition, pp. 11a-12a. The factors articulated in those decisions were reviewed and approved by this Court in *Pacific Mutual Insurance Co. v. Haslip, supra.* Based on those factors, the trial judge concluded that the jury's award of punitive damages was proper.

As an additional safeguard on the trial court's review of the punitive damage verdict, the Alabama Supreme Court conducted an independent review of the same factors. Applying the facts of the case to those factors, the Alabama Supreme Court concluded that the verdict should be reduced by $1 million.

The factors were properly applied by the Alabama Supreme Court and comport with due process in every respect. The Alabama Supreme Court considered the following factors in reviewing the jury's punitive damages award:

> '(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all

> the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.'

American Pioneer Life Ins. Co., v. Williamson, 1995 WL 372051, p. 2 (Ala. 1995); Petition, pp. 11a-12a.

In light of the above factors, the punitive damages award in this case, reduced to $2 million by the Alabama Supreme Court is entirely justified. The State of Alabama is entitled to take into account the need for deterrence in assessing the amount of punitive damages awarded for wrongful conduct. *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2723 n. 29 (1993) (plurality opinion); *Lake Shore & Michigan Southern Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893).

In addition, it is well settled that the profit or expected profit that a defendant stands to gain from the conduct in question is also an appropriate factor to consider in assessing punitive damages. *Pacific Mutual Insurance Co. v. Haslip*, 499 U.S. 1, 22 (1991). In the present case, the evidence presented to the jury indicated that *by petitioners' own projections* and using the interest rate petitioners guaranteed when respondent's vested renewal commissions were terminated, respondent would have received $112,500 over a ten year period if the commissions were invested. R. 737-739, 822. At trial, American Pioneer Vice President, Parent, testified that an insurance agent's vested renewal commissions are comparable to an annuity in that the money is earned by and owed to the agent. R. 398-399. When American Pioneer invoked the forfeiture provisions and terminated Mr. Williamson's vested renewal commissions, *the money was placed on petitioner's books* where it remains. R. 399.

Mr. Parent further testified that at the time of the forfeiture, American Pioneer owed Mr. Williamson money and that money was "put in the pocket of American Pioneer." R. 409. By revoking Mr. Williamson's vested commissions, the petitioners gained a windfall. This fact was taken into consideration by the jury, the trial judge and the Alabama Supreme Court in assessing the punitive damages applicable to this case.

Another factor considered by the Alabama Supreme Court in reviewing the punitive damages verdict was the wealth of the defendants. It is "well settled law" that the size of a punitive damages verdict may be reasonable when the defendant's wealth is taken into consideration. *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2722 n. 28 (1993) (plurality opinion). When this factor was considered, the Alabama Supreme Court reduced the verdict by $1 million. *American Pioneer Life Ins. Co., v. Williamson*, 1995 WL 372051, p. 2 (Ala. 1995); Petition, pp. 13a-14a. The remitted verdict constituted 4% of petitioner American Pioneer's worth.[8]

When reviewing the jury verdict in this case, the Alabama Supreme Court also considered the reprehensibility of the defendant's conduct and the defendant's awareness of that conduct. *American Pioneer Life Ins. Co., v. Williamson*, 1995 WL 372051, p. 2 (Ala. 1995); Petition, pp. 11a-12a. The evidence presented at trial showed the egregious nature of the petitioners' conduct. Before the petitioners' terminated Mr. Williamson's vested renewal commissions, he received no

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8. American Pioneer argues to this Court the $2 million verdict affirmed below is excessive in contrast to its surplus cash reserves of $7 million. Petition, p. 7. However, in presenting its argument for a reduction of the verdict to the Supreme Court of Alabama, American Pioneer utilized a more illustrative measurement of its wealth in excess of $47 million. American Pioneer's Brief in Support of App. for Rehearing, p. 16.

communications or notice that replacing a policy at the insured's request was prohibited. R. 708. Once the petitioners terminated the commissions, they stopped forwarding Mr. Williamson all information on his clients. R. 689, 719. Without this information, an agent such as Mr. Williamson cannot service his client's policies and preserve his commissions. R. 720.

Mr. Williamson's business was based on his reputation. R. 688. Once the petitioners terminated his commissions and withheld important client information, Mr. Williamson had no means to preserve his business and his reputation with his clients. R. 719-720; 724. Mr. Williamson suffered great harm to his relationship with his clients due to petitioners' refusal to provide information which would enable him to service his clients. That evidence was before the Alabama Supreme Court at the time it reviewed the jury's award of punitive damages. The Alabama Supreme Court correctly considered the reprehensibility of the petitioners' conduct when it reviewed the verdict. Petition, pp. 11a-12a. Based on that evidence, the verdict was justified and in accordance with the factors approved by this Court.

Because the verdict has been reviewed by the trial judge and affirmed on appeal, with a substantial reduction in the punitive damages award based on the factors articulated by this Court in *Pacific Mutual Ins. Co. v. Haslip, supra,* the verdict is not excessive and comports with the requirements of the Due Process Clause of the Fourteenth Amendment.

III.

THE FACTS OF THIS CASE ARE NOT SUFFICIENTLY SIMILAR TO *BMW V. GORE* TO JUSTIFY THIS COURT'S CONSIDERATION OF THE ISSUE PRESENTED BY PETITIONERS.

The petition asserts that the claim made by the petitioners in this case is the same as the claim made in the *BMW* case. Petition, p. 8; *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *cert. granted*, __ U.S. __, 115 S. Ct. 932 (1995). Petitioners ask this Court to hold the Petition pending its decision in *BMW*. It is true that the petitioners in *BMW* argued that substantive due process should impose limits on the size of punitive damages verdicts. However, the facts of the present case are not similar to those in *BMW* and this Court should deny the Petition.

A. The Petitioners In *BMW* Argued That BMW Was Punished For Extraterritorial Conduct.

One of the main arguments in the *BMW* case is that the jury and courts improperly based the punitive damages verdict on evidence that BMW sold approximately 1,000 partially damaged cars and represented those cars as "new" over a ten year period in the United States. As such, a large component of the punitive damages verdict in *BMW* was based on retrospective conduct. In the present case, the verdict was not based on retrospective conduct. Instead, one of the factors considered by the trial judge and the Alabama Supreme Court related to prospective matters. In other words, the trial judge and Alabama Supreme Court considered the amount of punitive damages necessary to deter similar conduct by the petitioners in the future.[9] *American*

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9. Petitioners attempt to argue that Mr. Williamson's closing statement urged the jury to punish them for past conduct relating to the 3,000 other agents (Cont'd)

Pioneer Life Ins. Co., v. Williamson, 1995 WL 372051, p. 4 (Ala. 1995); Petition, pp. 11a-12a. The respondent never asked the jury or courts below to consider past conduct in other jurisdictions. Irrespective of whether consideration of past conduct is improper in assessing punitive damages, the Alabama Supreme Court correctly concluded that an assessment of punitive damages in the amount of $2 million was necessary in order to deter similar conduct in the future.

B. Petitioners' Conduct Was Much More Reprehensible Than In *BMW*.

In *BMW*, the defendants repainted cars which suffered minor damage. The cars were fully and properly repaired and were in essence, "new" cars. The plaintiff, Dr. Gore, suffered only a potential loss relating to the resale value of the car.[10]

(Cont'd)
associated with American Pioneer. Petition, p. 5. Such was not the case. Mr. Williamson simply made reference to Petitioners' 3,000 agents and requested the jury to assess an amount necessary to make the "Al Parents and Jerry Curtises and the Karen Klines of this world to understand what they have done. . . . And every time somebody at American Pioneer picks up their pencil and gets ready to cross some agent off and take his vested renewals away, somebody else will say, wait a minute." R. 1122-1123. The argument was entirely related to the deterrence factor accepted by this Court in assessing punitive damages. Nevertheless, petitioners' assertion that the argument was improper has no bearing at this stage of the proceeding. Petitioners never objected to the argument nor did they raise the issue on their initial appeal to the Alabama Supreme Court.

10. The *BMW* case is factually and legally distinguishable from the present case because it involved a compensatory damage award of $4,000 as a result of nondisclosed damage to an automobile. In this case, the jury awarded $250,000 in compensatory damages as a result of the wrongful termination of Mr. Williamson's vested renewal commissions and accompanying emotional distress.

In the present case, Mr. Williamson was stripped of his vested renewal commissions. The evidence showed he could have received $112,500 over a ten year period if the commissions were invested. R. 737-739, 822. Petitioners *admitted* that the commissions were taken away from Mr. Williamson and "put in the pocket of American Pioneer." R. 409. Mr. Williamson never received the vested commissions which the jury determined belonged to him. Petitioners further admitted that the letter to Mr. Williamson revoking his commissions was prepared *before his file was reviewed*. R. 890.

In addition, the evidence showed that Mr. Williamson suffered great emotional distress due to the termination of his vested renewal commissions. R. 745-746. The petitioners' refusal to provide Mr. Williamson with necessary information with which to service his clients proved to be detrimental to his longstanding business reputation and his ability to service his clients. R. 745-746. These actions were taken by the petitioners with little or no information as to Mr. Williamson's reasons for replacing the policy. R. 890. The actions of the petitioners were taken in spite of the fact that Mr. Williamson was merely performing his *duty* to his client by providing the best product given his client's needs.

Because the conduct of the petitioners in the present case is much more egregious and reprehensible than that involved in the *BMW* case, and because the *compensatory* damages award was 62 times higher than in *BMW*, the Court should not use *BMW* as a benchmark in determining whether the award of punitive damages in this case was excessive and should not "hold" the petition as requested by petitioners.

CONCLUSION

For the foregoing reasons, Respondent Freddy Williamson respectfully requests the Court to deny the Petition For Writ of Certiorari.

Respectfully submitted,

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(3)

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NO. 95-1325

In the Supreme Court of the United States

OCTOBER TERM, 1995

AMERICAN PIONEER LIFE INSURANCE COMPANY AND JERRY CURTIS,
Petitioners

v.

FREDDY J. WILLIAMSON,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Petitioner American Pioneer Life Insurance Company is owned by American Pioneer Progressive Life and Health Insurance of New York, Inc., which is owned by Universal Holding Corporation. American Pioneer has no subsidiaries.

TABLE OF CONTENTS

Page

1. Petitioners raised in the courts below their claim that the punitive damage award violates the Due Process Clause of the Fourteenth Amendment.....1

2. Respondent's economic loss was $3,182, not $112,500.....3

CONCLUSION.....5

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1. PETITIONERS RAISED IN THE COURTS BELOW THEIR CLAIM THAT THE PUNITIVE DAMAGE AWARD VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Respondent is incorrect in the assertion that petitioners did not raise and preserve in the State courts the argument that the award of punitive damages violates the Due Process Clause of the Fourteenth Amendment.[1] Petitioners

[1] Respondent made the same argument in response to petitioners' motion for a stay in this Court. This was his only argument in opposition to the stay motion. Justice Kennedy granted a stay of the judgment of the Supreme Court of Alabama.

Respondent appended to his brief opposing petitioners' stay motion various briefs petitioners filed in the trial court and in the Alabama Supreme Court. In this reply to the brief in opposition, petitioners refer to these briefs (lodged with the Court by respondent) to establish that petitioners have consistently argued that the punitive damage award was so excessive as to violate their right to due process under the Fourteenth Amendment.

made their due process claim repeatedly both in the post-verdict proceedings in the trial court and in the Alabama Supreme Court.

In the trial court, in their motion for a new trial, petitioners contended that the punitive damage award is "contrary to due process of law . . . as guaranteed by the United States Constitution . . . in that the award for punitive damages is vague and not rationally related to any legitimate government interest"; that the "damages awarded . . . are excessive . . . in violation of the United States and Alabama Constitutions"; and that the $3 million in punitive damages awarded by the jury "so far exceeds the bounds of reasonableness as to shock the conscience of the Court".[2]

In their brief in the Alabama Supreme Court, petitioners argued that the trial court had failed to consider "constitutionally mandated" factors as required by the Supreme Court of the United States in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991).[3] (In the *Haslip* case, this Court addressed whether Alabama punitive damage procedures violated the due process clause of the Fourteenth Amendment.) In its decision in this case, the Alabama Supreme Court made clear that it had considered and rejected petitioners' federal constitutional claim. The court stated that it had "independently applied . . . the factors approved by

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[2] Motion for New Trial, Motion to Alter, Amend or Vacate Judgment, Motion for Remittitur and Motion for Judgment Notwithstanding the Verdict at ¶¶ 18, 20, 10 (Attachment 4 to respondent's brief in opposition to petitioner's application for a stay, see note 1 above).

[3] Brief of Appellants at 10, 43, and 44 (Attachment 1 to respondent's brief in opposition to petitioners' application for a stay, see note 1 above).

the United States Supreme Court in . . . *Haslip* . . .."[4]

In support of their application for rehearing to the Alabama Supreme Court, petitioners argued that "federal due process" required a reduction in the punitive damage award; that the punitive damage award was "contrary to due process of law . . . guaranteed by the United States Constitution", and that the Supreme Court of the United States had recognized that "the Due Process Clause 'imposes a substantive limit on the size of punitive damage awards' ", citing *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331. 2335 (1994).[5] In his dissent to the denial of rehearing, Justice Maddox stated that the $2 million remitted award of punitive damages is "an unconstitutional taking of American Pioneer's property."[6]

2. RESPONDENT'S ECONOMIC LOSS WAS $3,182, NOT $112,500

In his brief in opposition, respondent seeks to justify the punitive damage award of $2 million by repeatedly asserting that petitioners' conduct deprived him of $112,500 in earnings.[7] Contrary to this assertion, the undisputed evidence shows that respondent's lost commissions amounted

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[4] Appendix to the Petition at 11a.

[5] Application of Appellants for Rehearing at 4 (Attachment 3 to respondent's brief in opposition to petitioner's application for a stay, see note 1 above); Brief in support of Application for Rehearing by Appellants at 3-4 (Attachment 6).

[6] Appendix to the Petition at 19a.

[7] Brief in Opposition at 16, 3, and 21.

to only $3,182. The compensatory damage award of $250,000 is more than 78 times his economic loss, and the punitive damage award is more that 628 times his lost commissions.

An American Pioneer witness testified without contradiction that the company's decision to invoke the forfeiture provision resulted in respondent's loss of $3,182 in commissions for the three-year period 1989 through 1991, after which his commissions dropped below the minimum payable pursuant to his contract. R. 513-518. In his testimony, respondent explained an exhibit he prepared that purported to show, based on assumptions contrary to the undisputed evidence, that if he had received certain hypothetical amounts over a future ten-year period and had put these in an account at 8 per cent interest they would have been worth $112,500 at the end of ten years. R. 732-736; Pl. Exh. 21.[8] This is the source of the $112,500 figure employed in the opposition to the petition for certiorari. The figure is not mentioned in the opinion of the Alabama Supreme Court.

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[8] The statements in respondent's brief in opposition that the $112,500 figure is based on "petitioners' own projections" and on "an interest rate guaranteed when respondent's vested renewal commissions were terminated" (Brief in Opposition at 16) are without any evidentiary basis.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Dated: April 1, 1996

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